United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7177

To be argued by
ASA D. SOKOLOW

United States Court of Appeals

SECOND CIRCUIT

No. 75-7177

B

LONG ISLAND LIGHTING COMPANY,
Plaintiff-Appellant,

—against—

P/S

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM COMPANY,
Defendants-Appellees.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Plaintiff-Appellant,

—against—

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM COMPANY,
Defendants-Appellees.

REPLY BRIEF OF APPELLANTS

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Plaintiffs-appellants Long Island Lighting Company (LILCO) and Consolidated Edison Company of New York, Inc. (CON EDISON) submit this brief in reply to the brief of defendants-appellees.

A. The "Essence" of These Cases

The "essence" of these cases, according to appellees, is a complaint by the utilities "of the efforts of the various defendants to resist confiscation" of their oil properties by

Libya and other members of the Organization of Petroleum Exporting Countries in the Persian Gulf (Ans. Br. 2, 3 fn.).* From this mistaken premise, the oil companies argue that the decision below was correct, and that the utilities do not have standing to bring these antitrust actions because (a) they were not the "object" or "target" of the oil companies' anticompetitive conduct and (b) if they were, then the complaints show the utilities were not injured "by reason of" any antitrust violations. If appellants' premise is wrong—and it is wrong—then their entire argument must fail.

1. The First Claims for Relief

The "essence" of the First Claims for Relief, clearly pleaded in these complaints, is that the utilities were injured as a result of the boycott of Libyan low sulphur oil instituted by the oil companies. The object of the boycott was to stop the flow of Libyan oil to LILCO, CON EDISON and other East Coast utilities. A prime motive of the oil companies' boycott was to protect their domination and control of the importation of that product into the East Coast of the United States (A 8, 16-18, 31, 38-40).

Following the September 1, 1973 decree of the Libyan Government, the oil companies in conspiratorial concert agreed:

> "not to operate at 49% of normal rate—nor to handle any oil exports on behalf of Libyan Govt" (L 40, Ex. 29 at 50000127-128, App. Br. 15).

Accordingly, Standard Oil Company of California (SOCAL) suspended all deliveries of low sulphur Libyan oil, refused to produce any Libyan oil or handle any exports on

*References to "Ans. Br." are to the answering brief of defendants-appellees. References to "App. Br." are to plaintiffs-appellants main brief on this appeal.

behalf of the Libyan Government, refused to provide replacement oil and withdrew its tankers, which had been used to transport this oil for refining (A 12-13, 35-36). This was not a unilateral decision by SOCAL.* Rather, it was the result of agreements among SOCAL, Mobil Oil Corporation (MOBIL), Texaco Inc. (TEXACO) and other major members of the London Policy Group (LPG) taken pursuant to a conspiracy in existence at least since January, 1971 (A 10-12, 33-35). It was a course of conduct embarked on with full knowledge that LILCO and CON EDISON were dependent on Libyan low sulphur oil and that implementation of the boycott would cause them "material damage" (A 9-10, 31, 33, 71-72, 103), which it did (A 16-17, 39-40, ¶¶ 49-54, 49-52).

Cessation of production in Libya and refusal to export low sulphur oil were followed by attempts by the oil companies to intimidate those persons who tried to break the boycott—a strategy which was only partially successful (App. Br. 11, fn.). According to plan, SOCAL and TEXACO issued oral and written threats to the New England Petroleum Company (NEPCO), which had commenced dealing with the Libyan Government. SOCAL and TEXACO were joined by MOBIL in the institution of more than 25 groundless lawsuits against NEPCO, chasing the "hot oil" around the world. In addition NEPCO was threatened by SOCAL, its partner and pledgee (App. Br. 30), that purchase of Libyan oil "would not do any good to the relationship between SOCAL and NEPCO" (A 100).

As a direct result of this concerted action, the supply of low sulphur oil to the utilities dried up. The utilities had no choice but to pay substantially increased prices for

*Contrary to the suggestion of appellees (Ans. Br. 24), neither SOCAL nor any of the other majors decided to "relinquish" their oil business in Libya; indeed, subsequent to filing the complaints MOBIL settled with Libya on a 49%-51% basis, exactly the proposal that purportedly led it to impose the boycott in September, 1973.

a reduced quantity of low sulphur oil, and the complaints seek these and other damages resulting from the boycott (A 16-18, 38-40).

In summary, then, the "essence" of the First Claims for Relief of these complaints is that the oil companies engaged in precisely the anticompetitive conduct specifically condemned by the Department of Justice, to wit:

> ". . . joint oil company action which tends to reduce the supply of petroleum to the United States, such as . . . joint agreements among oil companies to halt production or cease lifting oil in any country, to boycott oil from any country or to chase so-called 'hot oil' " (A 154-7).

2. LILCO's Second Claim for Relief.

LILCO's Second Claim for Relief is dismissed by the oil companies on the supposed ground that LILCO's counsel "elected to acquiesce" in having decision on the First Claim govern the Second (Ans. Br. 12). There was no such "acquiescence"—and none was ever intended. LILCO's standing to assert the Second Claim was briefed below by all parties, and remained properly before the District Court on the motions.

LILCO's Second Claim for Relief, based on the Federal Trade Commission complaint attacking the entire integrated structure of the oil industry, is not limited to the specific events set forth in the First Claim. It charges the oil companies with the monopolization and price-fixing of low sulphur oil. LILCO, a major purchaser of this product, seeks damages for that overcharge. The complaint charges that the oil companies have used joint ventures and consortia to obtain control for themselves of the major sources of supply of low sulphur oil, and have restricted its production and refining, enabling them to maintain its supply at an artificially low level and its price at an artificially high one (A 19-20).

In terms of standing, then, LILCO's Second Claim for Relief presents as plaintiff a purchaser, albeit through an intermediary, of an artificially and unlawfully priced product. There is no issue whether LILCO is a "target" or "object" of the conspiracy, and LILCO most clearly has a right to recover its damages (App. Br. 12-13, 32).

B. The "Object" of the Conspiracy.

The oil companies conveniently construe the complaints to allege only a "single objective" for the conspiracy—preservation of their monopoly interest in the Persian Gulf area (Ans. Br. 9), and claim that there are "no factual allegations of any other purportedly wrongful conduct by defendants (Ans. Br. 9).

In six separate paragraphs in the First Claims the complaints expressly state that the specific acts pleaded therein were taken pursuant to a conspiracy intended to restrain and which restrained trade in low sulphur oil to be imported into the East Coast of the United States (A 8, 10-14). The complaints must be construed in their entirety,* and when they are, it is most apparent what they plead. The lame attempts to dismiss these averments as "pure conclusory statement[s]" is simply sham (Ans. Br. 9, fn., 24).

Clearly the anticompetitive conduct on which the First Claims are based is the boycott. That unlawful restraint of trade—joint action to halt production, refusal to export, chasing hot oil—had its anticompetitive effect in the market for Libyan low sulphur oil and caused damage to the utilities. That a motive of the oil companies related to the Persian Gulf has no effect on the utilities' standing (App. Br. 26-27). There is no doubt that the conspiracy and the boycott were intended to and did affect the utilities as pur-

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*And, of course, on this appeal they are to be construed in the light most favorable to plaintiffs (*cf.* Ans. Br. 17, fn.), as "skilled and knowledgeable counsel" for appellees should know.

chasers of Libyan low sulphur residual oil, and they have standing to maintain these actions.

C. Injury to the Utilities.

Promptly upon learning of the boycott, LILCO and CON EDISON tried to obtain low sulphur oil from other sources. No LPG member submitted an offer (A 16, 39). Since the complaints allege that the LPG was the vehicle for implementation of the conspiracy, the utilities intend to prove, after discovery, that this action constituted a concerted refusal to deal.* As LILCO and CON EDISON had to have low sulphur oil, if brownouts and blackouts in their service areas were to be avoided, they accepted the terms of NEPCO, the only supplier with low sulphur oil. Low sulphur oil already had been in "very tight supply" before the boycott; after it, at best, only 51% of Libya's supply was available, and the price of that oil rose precipitously (A 80).** The consequent injury to the utilities which paid those prices is apparent.

That LILCO has challenged the right of NEPCO under its contract with LILCO to charge these increased prices does not in any way affect its standing to bring its antitrust actions. Even the oil companies concede that NEPCO's price increases were a result of Libya's price

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*The cases appellees cite (Ans. Br. 32) with respect to the requirements for a claim of concerted refusal to deal are all decisions after trial holding that plaintiff failed to present adequate proof. Certainly they have no bearing on this motion directed solely to the pleadings. In any event, demand would have been futile since the complaint and the documents submitted on this motion demonstrated that none of the oil companies was lifting oil in Libya.

**Appellees surely are not serious in their assertion that "Experience and logic suggest that a victim of a boycott will tend to reduce prices to attract patronage rather than raise them and run the risk of losing its customers" (Ans. Br. 39). Experience and logic rather suggest that the sole supplier, the position thrust upon Libya in regard to the utilities by the oil companies' antitrust violations, is free to raise prices at will since its customers have nowhere else to turn.

increases (Ans. Br. 36).* The complaints charge that the unlawful conduct of the oil companies created this situation—the boycott reduced further the already "very tight supply" of low sulphur oil, and to get the oil and continue operation the utilities had to pay the price. Surely the complaints spell out causation sufficiently to withstand the motion to dismiss.

Of course, CON EDISON has not instituted a contract action against NEPCO, and appellees know it.** Although it would be logically consistent to do so, even appellees do not have the temerity to argue that CON EDISON lacks standing because its claim should be against NEPCO for breach of contract.

The NEPCO lawsuit is, to use appellees' term, a "strawman". It received undeserved attention in the court below and is irrelevant to the issues on this appeal.

D. Exclusion of Appellants' Exhibits.***

It is, at best, disingenuous for appellees to state that counsel for appellants consented to the exclusion of the oil company documents and other exhibits submitted in opposition to the motions before the District Court (Ans. Br. 11-12). The transcript of oral argument shows that, in response to the District Court's announcement that it would decide the joint motion first and adjourn the other two motions without date, counsel stated:

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*Indeed, they argue vigorously that this furnished an independent ground for dismissal. (Ans. Br. 36)

**The statement in their brief (Ans. Br. 38) that CON EDISON has challenged its *force majeure* clause and is seeking to recover increases paid NEPCO is thus erroneous.

***By the terms of F. R. C. P. 12(b), the District Court had discretion to consider all factual material presented and treat the motion as one for summary judgment. Given the extensive supporting materials offered, as well as the complexity of the issues raised by this suit, the District Court's flat refusal to take cognizance of the extrinsic evidence was inappropriate.

> ". . . We would have no objection if your Honor would set this down for a hearing soon because all of our discovery is at stake in this case at the present time so I would like to have an early hearing on those other motions" (A 110).

Even the District Court recognized that this was merely a request for prompt decision of the joint motion, to be followed by prompt action on the other two motions (A 110-11), and not in any sense an indication of consent to exclusion of the exhibits.

In fact, through the entire oral argument appellants' counsel sought to bring to the attention of the District Court the very exhibits the oil companies now baselessly suggest counsel had agreed to exclude. Each reference to these documents was met by the Court with a response such as "Let's forget the documents" (A 139) or "I don't want to hear about the documents" (A 145), which led the utilities' counsel finally to state that the Court's refusal to consider the documents was "unintentionally . . . hobbling me on this argument" (A 158).

This is a conspiracy case. The documents uncovered in preliminary discovery are critical to amplifying the allegations of the complaints. Appellees concede in their brief that the documents "do not in any significant way alter the substance of the pleadings" (App. Br. 17) and they should have been considered by the District Court and should be considered by this Court on this appeal.

Finally, far from "disavowing" the complaints, as appellees' suggest (App. Br. 17), the excluded exhibits establish the truth of their allegations.

For example, the complaints charge that the oil companies refused to lift any Libyan oil despite the fact that "49% of the AMOSEAS-produced crude oil still belonged to SOCAL and TEXACO, and that most of the remaining

51% was being offered . . . on a buy-back arrangement" (A 12-13, 35). The documents uncovered in SOCAL's files record that at a meeting of the LPG, the oil companies agreeed:

> "Not to operate at 49% of normal rate—nor to handle any exports on behalf of the Libyan Gov (L 40, Ex. 29 at 50000127-128, App. Br. 15).

Similarly, appellees question whether this was a boycott, and point to an excluded document which indicates that the State Department had informed NEPCO that after September 1, 1973, TEXACO and MOBIL were continuing to lift 49% of their entitlement in Libya (Ans. Br. 40). In fact, E. M. Carey, chief executive officer of NEPCO, testified on deposition (with counsel for appellees present and cross-examining), that after SOCAL's September 1, 1973 action both TEXACO and MOBIL specifically refused to sell NEPCO any low sulphur oil (A 90).

None of this, of course, alters the substance of the allegations of the complaints. The boycott, the campaign to chase hot oil and the refusal to provide low sulphur oil to the utilities constitute the most serious antitrust violations, and caused injuries to the utilities for which they are entitled to seek redress.*

E. The District Court's Misstatement of the Facts.

Appellees accuse the utilities of distorting the factual findings of the District Court (Ans. Br. 16). Specifically, they state that appellants fail to "pinpoint" the respects in which the opinion below was inaccurate and misleading (Ans. Br. 16). However, the District Court's mistakes of fact are plainly detailed in appellant's brief (*see,* i.e., App. Br. 49 and 15-16).

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*This is precisely the conduct condemned by the Department of Justice (*supra,* p. 4). As the brief *amicus curiae* of the New York State Public Service Commission demonstrates, the utilities in these cases are representing the interests of more than 3,000,000 electric customers.

For example, the decision below states "no other objective of the conspiracy is averred [except] to broaden the monopoly interests of the defendants and others in the Persian Gulf area" (A 168). The complaints plead that the oil companies "conspired" . . . and have in fact unlawfully restrained and monopolized trade and commerce in low sulphur oil to be imported into the East Coast of the United States (A8, 31). Thereafter, references in the complaint are to the *objectives* of the oil companies.

The Court's apparent misunderstanding of the case was reflected in its failure to comprehend at oral argument the uniqueness and non-interchangeability of Libyan low sulphur oil (A139-44) despite appellants' constant reminders that use of such specialized oil was necessitated by environmental regulations. It further characterized the refusal to deal with NEPCO as a single-firm business decision by SOCAL in the face of allegations in the complaints and documentation of concerted oil company activity (A142-5). Finally, the Court failed to recognize that the oil companies jointly refused to lift any oil from the 49% of their concessions unaffected by nationalization (A146), thus eliminating any price competition between the oil companies and Libya, and was unable to perceive antitrust violations despite allegations and documentation of the specific oil company activity condemned by the Department of Justice (A138-61, esp, 154-7).

I

APPELLEES MISCONSTRUE THE STANDING REQUIREMENT IN THIS CIRCUIT

The issue on this appeal is whether LILCO and CON EDISON have standing under § 4 of the Clayton Act. Appellees argue they do not, because under the rule in this circuit the utilities were not "objects" or "targets" of the conspiracy. Their brief, however, evidences a *per se* approach to standing that is not now and never has been the law of this Circuit.

There was a concerted decision by the oil companies to shut down production and export of Libyan low sulphur oil, to refuse to deal with NEPCO and then the utilities directly, and to harass NEPCO and others who tried to break the boycott. The action was taken (a) to preserve their control over the production of Libyan oil for which it was necessary to isolate the principal consumers of their Libyan product — the East Coast utilities—from their normal supply of low sulphur oil and (b) to preserve their domination of oil operations in the Persian Gulf.

Who was injured as a result of the conspiracy? Not Libya—it took advantage of the shortage to raise the price. Not NEPCO, a conduit whose revenues increased upon sale of the oil to the utilities at the higher Libyan price. LILCO and CON EDISON ultimately paid these prices, and if the facts are examined, one is led inescapably to the conclusion that the utilities were parties directly injured as a result of the conspiracy.

It would appear logical, then, that LILCO and CON EDISON, intended victims actually injured as a result of a conspiracy, should have standing to sue. The District Court held otherwise, tersely stating that this case "appears to be ruled by *Calderone Enter. Corp.* v. *United Artists Theater Circuit, Inc.*, 454 F. 2d 1292 (2d Cir. 1971), *cert. denied,* 406 U. S. 930 (1972)" (A 173), and on the face of the complaints concluding that the utilities were not "targets".

To defend this hasty dismissal, appellees set up and knock down a series of "strawmen" to disguise a conclusion wholly at odds with existing law. Citing without discussion the past decisions of this Court denying antitrust standing, the oil companies argue that concrete, easily applied rules have emerged for determining standing. Since this Court has held that certain plaintiffs in certain circumstances, such as employees, stockholders, creditors, landlords, franchisors and licensors cannot recover damages deriving from

their relationship to, and as a result of, damages sustained by their employers, corporations, debtors, tenants, franchisees and licensees, appellees conclude—without analysis—that the utilities in these actions do not have standing.

Of course, the utilities are not licensors, stockholders or the like. Each "category" of plaintiff excluded by this Circuit in the cases appellees cite suffered injury only because revenues of a related enterprise *declined* as a result of an antitrust violation. In contrast, NEPCO *profited* from the antitrust violations charged in the instant case. The utilities' damages were not a function of injury to NEPCO or any other party, but were a direct result of the oil companies' actions. On the facts of these cases, therefore, the utilities do not fall into any *per se* excluded "category" of plaintiff.

The express language of this Court hardly evidences the inflexible *per se* approach to standing that appellees take. On the contrary, *Calderone* requires that standing under § 4 be determined by a *"rule of reason"*, 454 F. 2d at 1296 (emphasis added). The Court must "examine the form of the violation alleged and the nature of its effect on a plaintiffs' own business activities". *Billy Baxter, Inc.* v. *Coca Cola Co.,* 431 F. 2d 183, 187 (2d Cir. 1970), *cert. denied,* 401 U. S. 923 (1971), and must take into account the Congressional policy inherent in private enforcement of the antitrust laws and the needs of judicial administration, 454 F. 2d at 1295. This is not the language of a *per se* approach to the issue of standing.

Indeed, citation by this Court of the Ninth Circuit decisions in *Hoopes* v. *Union Oil Co. of Calif.*, 374 F. 2d 480 (9th Cir. 1967) and *Mulvey* v. *Samuel Goldwyn Productions,* 433 F. 2d 1073 (9th Cir.) *cert. denied,* 402 U. S. 923 (1971) as consistent with the result reached in *Calderone,* 454 F. 2d at 1297, n. 5, emphasizes the flexible nature of standing requirements in this Circuit. This Court saw

no conflict between those decision and its decision in *Calderone* precisely because under a rule of reason approach the Ninth Circuit's results were entirely appropriate on the facts presented. Hence, appellees' attempt to impute to the utilities (Ans. Br. 26) a test rejected by a majority of this Court is itself a specious strawman. *Hoopes* and *Mulvey* were cited by this Court and by appellants to underscore what is patently obvious: that individual factual analysis is prerequisite to standing determinations.

Therefore, given the language of *Calderone* and *Billy Baxter*, the oil companies' assertion that antitrust courts, in applying an inflexible target area rule, may not weigh the facts of each case or look to the Congressional purpose behind the antitrust laws in determining standing (App. Br. 33) squarely contradicts the established law in this Circuit. It is consistent, however, with appellees' rather curious observation that consideration of whether "the cause of justice would be advanced" is not properly within the scope of the judicial function (Ans. Br. 33).*

Scrutiny of appellees' standing argument reveals that, like the character in "Through the Looking Glass", when appellees "use a word . . . it means just what [they] choose it to mean—neither more nor less." Never pausing to define the words "intent", "aim", "target" and "object", appellees' argument leads to the anomalous conclusion that one may intentionally "aim" at and "injure" an "object", with the express intent to cause such "injury", but if that

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*There are spheres of substantive antitrust law, such as price fixing and group refusals to deal, where rigidly applied *per se* rules are appropriate. But such a rule clearly has no place in standing determinations where as this Court has explicitly recognized, a *per se* approach would be inimical to the intended operation of the antitrust laws.

Of course, in rejecting the oil companies' *per se* rule, appellants do not suggest that no standards exists to govern the disposition of standing in antitrust suits. However, the applicable standards, such as directness of injury, are to be applied to the facts presented, according to the required "rule of reason".

"object" is not a "target", under *per se* application of *Calderone,* it would not have standing.

Appellees reason that since an injured victim does not necessarily have standing (Ans. Br. 18), nor does an intended victim, (Ans. Br. 26-31), therefore, an intended victim actually injured does not have standing. Together with the postulate that *Calderone* imposes a *per se* standing cut-off precluding judicial investigation of the merits raised by the facts, the result, presented under a guise of knocking down "strawmen", is that antitrust standing can attach only to a competitor or one in privity. The rigid construction of *Calderone* necessarily excludes everyone else. Absent discretion to consider the individual circumstances, the Court must look to the only rubrics which survive appellees' analysis. But, as appellants' main brief demonstrates (App. Br. 17-23), such restrictions on standing are not and never have been the law in this Circuit or elsewhere.

The utilities suffered direct injury from the boycott of Libyan low sulphur oil instituted by the oil companies. Used with their common meanings, and after a rule of reason examination of "the form of violation alleged and the nature of its effect on a plaintiff's own business activity", *Billy Baxter, supra,* 431 F.2d at 187, it is apparent that appellants were the intended targets and injured victims of the conspiracy and the restraint of trade implemented by the oil companies with the object, among others, of perpetuating their unlawful control in the market for low sulphur oil to be imported to the East Coast of the United States. As such, the utilities have standing to maintain these actions.

II

THE COMPLAINTS SATISFY THE "BY REASON OF" REQUIREMENT

One ground for the District's Court's dismissal was its determination that the cause of injury to the utilities was

not attributable to the oil companies' antitrust violations, but rather arose from NEPCO's price increases, which it found were caused by Libya's price increases after the boycott. The Court's error derives from its failure to realize that the actions of the oil companies removed at least 49% of Libyan low sulphur oil from the market. Clearly the boycott was a "substantial factor" in the occurrence of injury to the utilities and the complaints could not be dismissed on that ground (App. Br. 35-42).

However, the Court further held that under *GAF Corp.* v. *Circle Floor Co.*, 463 F. 2d 752 (2d Cir. 1972), *cert. denied,* 413 U. S. 901 (1973), damages are allowed only to those injured in their ability to compete and:

> "There is nothing in the complaint to show that Lilco suffered any competitive disadvantage. No such showing could be made since Lilco does not engage in competition, as its memorandum recognizes (p. 107). It is a regulated monopoly" (A 175).

Despite appellees' attempts to reconstruct this language, it is plain that the Court held that public utilities victimized by antitrust violations do not have a right of action under the antitrust laws, a holding completely in conflict with settled authority. (App. Br. 42-45).

Implicitly recognizing that these conclusions are unsupportable, appellees now contend that the true ground for the Court's dismissal was:

> ". . . that plaintiffs had no competitive position in the trade injured by the claimed illegal restraint [the Persian Gulf] and in fact had no competitive position there whatever" (Ans. Br. 38).

This argument too is of no avail. It rests on the mistaken conclusion that the *only* anticompetitive effects of the conspiracy were felt in the Persian Gulf.

The restraint of trade charged in the First Claims was an unlawful boycott of Libyan oil and its effects were felt in the market for importation of that oil into the East Coast of the United States. Whether the boycott also had an anticompetitive effect in the Persian Gulf is irrelevant to the issue of the utilities' standing. This was made very clear by appellants in the District Court:

> "... For a reason known only to them, defendants stress that plaintiffs' claims are barred because the alleged injuries do not flow from the monopoly situation in the Persian Gulf (Joint Brief at 24). Plaintiffs fail to comprehend the import attached to this contention, since the complaints and this brief reiterate time and again that anti-competitive conduct in Libya gave rise to plaintiffs' injury. Protection of monopoly interests in the Gulf was one motive behind defendants' Libyan activities. But the lack of any other connection between the Gulf situation and the plaintiff's injuries is wholly irrelevant" (L 41 at 108; *cf.* Ans. Br. 38).

Clearly, even the rationale concocted by appellees does not make the District Court decision valid. The complaints and the exhibits demonstrate that the injuries sustained by the utilities resulted directly from the anticompetitive effects of the antitrust violations alleged on the market in the East Coast of the United States for low sulphur oil.

Under no circumstances, then, does the *GAF* decision bar these actions. The plain fact is that GAF was denied standing because no damages were incurred. As Judge Gurfein stated, "GAF simply was not injured by any antitrust violation." *International Rys. of Cent. Amer.* v. *United Brands Co.,* 358 F. Supp. 1363, 1371 (S. D. N. Y. 1973). The injuries to LILCO and CON EDISON are not disputed by appellees. The complaints, exhibits and

appellants' brief demonstrate that those injuries were a direct result of antitrust violations by the oil companies. The utilities therefore have standing to bring these actions.

III

CONCLUSION

None of the appellees' posturing can save a decision which conflicts with all the applicable law. Ignoring or rewriting the District Court's actual opinion does not cure its defects. Nor does a misconstruction of the relevant law to bring it in line with the opinion below avail appellees. The District Court disposed of complex factual issues on a preliminary motion, prior to full discovery of the facts relating to the alleged conspiracy, and without a complete understanding of those facts presented. Its holding must not be allowed to stand.

Therefore appellants respectfully submit that the decision of the District Court should be reversed.

June 13, 1975

Respectfully submitted,

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Lord, Day & Lord

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